United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1190

ORIGINAL

To be argued by
THOMAS J. O'BRIEN

b
pgs

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DONALD SHERMAN,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLANT

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No. 75 - 1190

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

DONALD SHERMAN,

Defendant-Appellant.

BRIEF FOR APPELLANT DONALD SHERMAN

Preliminary Statement

The Appellant, Donald Sherman, appeals from the United States District Court for the Eastern District of New York's denial on April 25, 1975 of his motion to withdraw his pleas of guilty and from the Judgment of Conviction and Sentence entered in the United States District Court (Weinstein J.) on April 25, 1975. Appellant pled guilty to the one count information on March 3, 1975. The information, 75 CR 154, charged

the Appellant with aiding and abetting the payment of money in supplementation of the salary of a government employee on September 19, 1969 in violation of 18 U.S.C. sections 209 and 2. The Appellant was sentenced to imprisonment for one year pursuant to 18 U.S.C. section 3651 with a provision being made that the defendant be confined for one month in a community treatment center and the execution of the remainder of the sentence was suspended and the Appellant placed on unsupervised probation for eleven months. The Appellant was also fined $5,000.00.

Statement of Facts

The Appellant was originally charged under indictment, 72 CR 596, with ten counts of indirectly bribing, Edward Goodwin, an FHA employee, in violation of 18 U.S.C. sections 201 (b)(1) and 2 as well as conspiracy to do the same *(A22a). During plea negotiations on the underlying indictment, the government advised the Appellant that their investigation into the FHA had disclosed additional evidence against him and he could expect a new indictment. The government further advised the Appellant that a plea of guilty to a misdemeanor would satisfy not only the outstanding indictment 72 CR 596, but also all other FHA or VA related offenses which occurred during this period of time (A 10a, 11a, 23a).

After discussions and on March 3, 1975, the one count information, 75 CR 154, was filed, the information charged, in pertinent part, as follows:

* A - Appendix for Appellant

"On or about the 19th day of September, 1969, within the Eastern District of New York the defendant, Donald Sherman, a source other than the Government of the United States knowingly and unlawfully did aid and abet the payment of approximately fifty dollars to Edward Goodwin, in supplementation of the salary he received during the period from the United States Government...."
in violation of 18 U.S.C. §209. (A 3a)

Thereafter, the defendant entered a plea of guilty to the information with the understanding that the indictment, 72 CR 596, would be dismissed and that no new indictments would be returned for any similar crimes (A10a, 11a, 23a).

At the time the plea was entered the defendant was asked the following question and gave the following answer:

Question: "Has anybody made any threats or promises to induce you to plead guilty?"

Answer: "Nothing other than the normal procedure, the possibility of a superseding indictment. Whatever that I guess is - is mandatory procedure. Other than that, nothing." (A8a)

The defendant also advised the Court at that time that he was being treated by a psychiatrist for a mental or emotional problem brought about as a result of the indictment. He further informed the Court that he was taking prescribed drugs such as valium, stelazine and sinequan (A5a to 7a).

The Court advised the defendant that he had a constitutional right to a jury trial and then had the following colloquy:

"The Government would have to prove you guilty beyond a reasonable doubt and you would have many other protections. Have you discussed them with your attorney?"

The Defendant: "Yes."

The Court: "Do you wish to waive them?"

The Defendant: "Yes."

(A12a)

Prior to sentence and on April 21, 1975, the defendant moved to withdraw his plea on the grounds that it was not voluntary, that the plea to a crime barred by the statute of limitations is a nullity or in the alternative that any sentence based upon that plea would be unlawful. (A 16a to 20a)

At the hearing the defendant advised the Court that he entered his plea because he was unable to function with the indictment hanging over his head for three years and that the possibility of a new indictment and new witnesses extending the period for additional years was more than he could cope with. He said that he wanted and intended to go to trial but pled to put an end to the matter. He also denied his guilt stating that he had no specific knowledge of any money being paid the FHA employee. (A 37a, 38a, 42a to 47a)

The Court denied the motion to withdraw the plea and imposed the sentence upon the defendant. It is from that decision and sentence that the defendant appeals.

QUESTIONS PRESENTED

1. Whether the defendant's plea was voluntary?

2. Whether the statute of limitations barred the entry of a plea of guilty?

3. Whether a plea to a crime barred by the statute of limitations is a nullity?

4. Whether the sentence imposed was unlawful?

POINT I

THE PLEA WAS INVOLUNTARY SINCE THE DEFENDANT WAS NOT ADVISED OF HIS CONSTITUTION RIGHTS

Before the Court accepted the defendant's plea, Judge Weinstein advised the defendant that he had a constitution right to a jury trial where the government would be required to prove quilt beyond a reasonable doubt. The Court further advised the defendant that he would have "many other protections" but the Court did not elaborate or specifically advise the defendant that he had a privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and that he had a right to confront his accusers which he would waive by pleading guilty.

We contend that the failure to advise the defendant of these constitutional rights is in violation of the teaching of the Supreme Court in Boykin v. Alabama, 395 U.S. 238 (1969) and renders the plea involuntary.

In Boykin, supra, a defendant entered a plea of guilty and the record was silent as to what rights, if any, he was informed that he was waiving by his plea. In setting aside the conviction the Court held that the same standards used to

determine whether a confession was voluntary must be applied to determine whether a guilty plea is voluntary. The Court went on and said at 395 U.S. 243.

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment----. Second is the right to trial by jury. (Citation omitted). Third, is the right to confront one's accusers. (Citation omitted) We cannot presume a waiver of these three important federal rights from a silent record."

From the record herein, it is clear that the Court below did not advise the defendant that he was waiving his Fifth Amendment right against self-incrimination and his Sixth Amendment right to confront his accusers by the plea of guilty.

Since a wiaver is an "intentional relinquishment or abandonment of a known right" and since courts should "indulge every reasonable presumption against waived" and "not presume acquiescense in the loss of fundamental rights, Johnson v. Zerbst 304 U.S. 458, 464, (1937) we contend that the plea of guilty was not voluntary."

POINT 2

PLEA WAS INVOLUNTARY IN THAT IT WAS COERCED BY A THREAT OR A FEAR OF ADDITIONAL PROSECUTIONS

In United States v. Jackson, 390 U.S. 570 (1968) the Supreme Court reasoned that a coerced waiver of Fifth and Sixth Amendment rights vitiated the voluntariness of the guilty

plea. The Court defined a coerced plea as one which impairs the free exercise of a constitutional right; thus vitiating the voluntariness of the guilty plea.

It is noteworthy that the Jackson Court suggested that a procedure need not be inherently coercise to cast an impermissible burden on the assertion of a constitutional right.

In Brady v. United States, 397 U.S. 742, (1969) the Supreme Court while upholding the constitutionality of plea bargaining said at 397 U.S. 750.

> "Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."

The petitioner in Machibroda v. United States, 368 U.S. 487 (1962) alleged that the Assistant U.S. Attorney promised a certain sentence in return for a plea of guilty. He further alleged that he was cautioned not to tell his attorney about the conversation. When petitioner insisted upon advising his lawyer, the Assistant U.S. Attorney told him that if he "insisted in making a scene" certain unsettled matters concerning two other robberies would be added to the petitioners difficulties. The Court said at 368 U.S. 493:

> "There can be no doubt that, if the allegations contained in the petitioner's motion and affidavit are true, he is entitled to have his sentence vacated. A guilty plea, if induced by promises or threats which leprive it of the character of a voluntary act, is void."

This Court also held in United States v. La Vallee 319 F2d 308, 311 (2 Cir. 1963):

> "It is clear that a conviction whether in a state or federal court, based upon an involuntary plea of guilty -- one induced by promises or threats -- is inconsistent with due process of law. If the plea was the product of coercion, either mental or physical or was unfairly obtained or given through ignorance, fear or inadvertence, Kercheval v. U.S. 274 U.S. 220, 224, 47 S.Ct 582, 583, 71 L. Ed. 1009 (1927) the judgement of conviction which rests upon it is void."

We submit that the plea was not voluntary. The defendant had intended to go to trial until the government, after the trial date had been set, advised the defendant that if he insisted on going to trial, a new indictment would be returned against him (A 20a, 23a). At that time the defendant was undergoing the care of a psychiatrist as a result of the emotional strain stemming from the underlying indictment. Unable to reach a decision, he sought the advice of his doctor who told him that it would be in his best emotional interests to dispose of the case quickly (A44a). The defendant decided to plead guilty not because he was guilty (42a-47a) but because of the threat of a superseding indictment which he believed would cause further delay in an already protracted case.

While we do not maintain that the government's actions were improper, we do maintain that, threat of the new indictment, in the words of U.S. v. Jackson, supra, "impaired the free exercise" of the defendant's constitutional right. We submit that this is the "mental coercion" overbearing the will of the defendant which the Court condemned in Brady v. U.S., supra.

The defendant moved to withdraw his plea of guilty prior to sentence and the government would not be prejudiced by the withdrawal of the plea. Although the government contends that they have released their witness, Mr. Goodwin, (A30a,32a). he is still subject to subpeona. Moreover the government's contention that they have stopped their investigation and that additional charges may be barred by the statute of limitations, is without merit. The government could begin its investigation again and the defendant advised the government that he would wiave the statute of limitations as a defense for the period of delay resulting from his plea and motion to withdraw that plea (A30a-32a). The defendant pled guilty on March 3, 1975. The trial was scheduled for April 21, 1975 and the defendant moved to withdraw the plea on April 25, 1975. Therefore, the delay caused by the defendant was at most six weeks.

This trial would take only two or three days and the defendant should not be deprived of his constitutional right to a trial.

POINT 3

A PLEA TO AN OFFENSE BARRED BY THE STATUTE OF LIMITATIONS IS A NULLITY

The information filed on March 3, 1975, charged the defendant with aiding and abetting the payment of money in supplementation of the salary of a government employee on September 19, 1969 in violation of 18 U.S.C. §209 and 2. The

underlying indictment did not charge this crime but rather charged the defendant with bribery in violation of 18 U.S.C. §201 (b) (1).

Section 3282 of Title 18 provides, in pertinent, part as follows:

> "no person shall be prosecuted, tried or punished for any offenses not capital unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

It seems clear that the crime charged in the information occurred 5 1/2 years prior to the information was instituted and accordingly is barred by the statute of limitations. The question remains whether the defendant waived that defense by his plea of guilty. We contend he did not.

In United States v. Harris 133 F. Supp. 796 (W.D. Mo. 1955) aff'd other grounds 237 F2d 274 (8 Cir. 1956) the defendant pled guilty and thereafter moved to vacate the sentence on the grounds that the crimes to which he pled were barred by the statute of limitations. In setting aside the sentence, the Court said at 133 F. Supp. 799:

> "Though the plea of guilty admitted all the facts averred in the information, which, as respects Counts 3 through 22 here, alleged crimes that were barred by the limitations of Section 3282, it did not constitute a waiver of jurisdictional defects, United States v. Gallagher, 3 Cir. 183 F.2d 342,344, and if a sentence has been imposed under an indictment or information that is so obviously defective as not to charge a punishable offense,

> it will be vacated upon a motion under Section 2255, Title 28 U.S. C.A., Klein v. United States, 7 Cir., 204 F.2d 513, and the same is true where it appears on the face of the information that no punishable Federal offense has been committed, Kreuter v. United States, 10 Cir. 201 F.2d 33.
>
> Moreover, it is to be noted that Section 2255, supra, does not limit power and duty of the Court to vacate sentences to those cases in which the Court was without jurisdiction to impose the sentence. The statute also says that it is within the power and is the duty of the Court to vacate a sentence that 'was imposed in violation of the Constitution or laws of the United States *** or is otherwise subject to collateral attack***'. In the circumstances here, I think the sentences imposed upon defendant under Counts 3 to 22, inclusive, of the information were imposed in violation of the laws of the United States, namely Section 3282, supra, and that those sentences are subject to collateral attack on that ground."

We recognize that this Court held contra in United States v. Doyle 348 F2d 715 (2 Cir. 1965) but we submit that the Doyle case is distinguishable from the facts herein.

In Doyle, the defendant was aware of the statute of limitations question prior to his plea and waived it. As the Court said at 348 F2d 719:

> "Moreover, even if Cook and Parrino do not mean what we think they mean, we would nevertheless decline to consider Doyle's limitation and Sixth Amendment claims on the facts of this case. Even if such claims are not waived by pleas of guilty simpliciter, a defendant advised by counsel can agree so to waive them, and the circumstances compel the conclusion that Doyle did precisely that."

Moreover, in Doyle, as well as in United States v. Cook 84 U.S. 168 (1872) and United States v. Parrino 203 F2d 284 (2 Cir. 1953) the cases cited to support the Doyle decision, the defendant was sentenced prior to the time the statute of limitations question was raised.

Under our facts the defendant was unaware that the crime charged in the information was barred by the statute of limitations at the time he entered his plea and sentence had not as yet been imposed when he raised the statute of limitations as a ground for withdrawing the plea. Accordingly, we submit the plea should be vacated.

POINT 4

PUNISHMENT IMPOSED FOR A CRIME BARRED BY THE STATUTE OF LIMITATION IS UNLAWFUL

Even if this Court concludes that the conviction must stand because the defendant waived the statute of limitations by his plea of guilty, the Court should still vacate the punishment imposed.

Section 3282 of Title 18 states that "no person shall be tried or punished for any offense" outside the five year statutory period.

Here the defendant raised the statute of limitations before the Court imposed the punishment of one month incarceration and $5,000.00 fine. We submit that the punishment was in the

COURT OF APPEALS
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Index No.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

DONALD SHERMAN,

Defendant-Appellant.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 10TH day of June 1975 ~~1974~~ at 225 Cadman Plaza, Brooklyn, N.Y.

deponent served the annexed BRIEF upon

David G. Trager, U.S. Attorney for the Eastern District

the Attorney in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 10TH day of ~~1974~~ June 1975

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

in the language of 28 U.S.C. 82255 "in violation of the Constitution or laws of the United States" to wit 18 U.S.C. §3282.

CONCLUSION

The defendant should be permitted to withdraw his plea of guilty and to stand trial or in the alternative the punishment imposed should be vacated.

Respectfully submitted,

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